LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
NOV 9 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 763

**UNION BARGE LINE CORPORATION,
DRAVO CORPORATION and
AETNA CASUALTY AND SURETY COMPANY,**
Petitioners,

versus

WALTER M. ALLEN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

GEORGE B. MATTHEWS of
LEMLE & KELLEHER,
1836 National Bank of
Commerce Building,
New Orleans, Louisiana,
Attorneys for Union Barge Line Corporation and Aetna Casualty and Surety Company.

W. FORD REESE,
GEORGE V. BAUS of
ADAMS AND REESE,
846 National Bank of
Commerce Building,
New Orleans, Louisiana,
Attorneys for Dravo Corporation and Aetna Casualty and Surety Company.

HAUSER-AMERICAN, "LEGAL PRINTERS", 441 GRAVIER STREET, NEW ORLEANS, LA.

INDEX

	PAGE
Petition for Writ of Certiorari	1
Opinions Below	2
Jurisdiction	2
Question Presented	2
Statement of the Case	2
Reasons for Granting the Writ	5
Argument	6
Conclusion	12
Certification of Service	12
Appendix "A"—Opinion of District Court	13
Appendix "B"—Opinion of the Court of Appeals for the Fifth Circuit	25
Appedix "C"—Judgment of the Court of Appeals for the Fifth Circuit	27
Appendix "D"—Action of the Court of Appeals for the Fifth Circuit on charge for rehearing	29

AUTHORITIES CITED

Cases

PAGE

Berryhill vs. Pacific Far East Line, 238 F. 2d 385 (9th Cir. 1956), *cert.* denied 354 U.S. 938, 77 S. Ct. 1400, 1 L. Ed. 2d 1537 (1957) 7, 11

Lawlor vs. Socony-Vacuum Oil Company, 275 F. 2d 599 (2d Cir. 1960) 5, 9, 11

Raidy vs. United States, 252 F. 2d 117 (4th Cir. 1958), *cert.* denied 356 U.S. 973, 78 S. Ct. 1136, 2 L. Ed 2d 1147 (1958) 6, 11

Roper vs. United States, 368 U.S. 20, 82 S. Ct. 5, 7 L. Ed 2d 1 (1961) 6, 11

United N. Y. & N. J. Sandy Hook Pilots Assn. vs. Halecki, 358 U.S. 613, 79 S. Ct. 517, 3 L. Ed. 2d 541 (1959) 7, 11

West vs. United States, 361 U.S. 118, 80 S. Ct. 189, 4 L. Ed. 2d 161 (1959) 5, 8, 11

Statutes

28 U.S.C. § 1254 (1) 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No.

UNION BARGE LINE CORPORATION,
DRAVO CORPORATION and
AETNA CASUALTY AND SURETY COMPANY,
Petitioners,

versus

WALTER M. ALLEN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Come now Union Barge Line Corporation, Dravo Corporation and Aetna Casualty and Surety Company, petitioners, and respectfully pray that this Honorable Court issue a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit entered herein on the 24th day of May, 1966, affirming a judgment of the United States District Court for the Eastern District of Louisiana in favor of respondent, Walter M. Allen, and the order of the same Court denying rehearing entered on the 29th day of August, 1966.

OPINIONS BELOW

The opinion of the District Court below is reported at 239 F. Supp. 1004 and the opinion of the Court of Appeals for the Fifth Circuit is reported at 360 F. 2d 217. Both opinions are reproduced in the Appendix hereto. The order denying rehearing is unreported, and is reproduced in the Appendix.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on May 24, 1966. A petition for rehearing was timely filed and thereafter the said Court entered its order denying rehearing without opinion on August 29, 1966. The mandate has been stayed pending the filing of this application.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTION PRESENTED

Whether or not a land based shipyard worker injured while performing repair work on a vessel in drydock during an annual overhaul which entailed the surrender of control of the vessel to the shipyard, extensive use of cranes and other specialized shipyard equipment not available on the vessel, and the removal, machining and reinstallation of the propellers and propeller shafts, was engaged in work traditionally performed by a crewmember on a vessel in navigation so as to entitle the injured worker to invoke the doctrine of unseaworthiness.

STATEMENT OF THE CASE

This admiralty action against the M/V MARINER, Union Barge Line Corporation, its owner, and Aetna Casualty and Surety Company, Union's insurer, was brought

in the District Court of the United States for the Eastern District of Louisiana by a land based shipyard worker in the employ of Dravo Corporation, who was injured while working aboard the Towboat *MARINER*, of 1,108 tons, owned by Union Barge Line Corporation, which was then in drydock at the Dravo Shipyard in Baton Rouge, Louisiana. Union claimed over against Dravo Corporation and Aetna Casualty and Surety Company, which also insured Dravo.

The evidence shows that the *MARINER* went into the Dravo yard in Baton Rouge for extensive repairs. One of the items of repair required the removal of the propellers and propeller shafts, which were to be taken to the machine shop by a Gantry crane, there machined and then reinstalled. One portion of the propeller shaft to be removed was approximately thirty-five feet in length, and thirteen inches in diameter and weighed approximately 15,750 pounds. Heavy chain draws were utilized to remove the propellers and the shafts, and highly specialized equipment was used in connection with the machine work. After the shop work was completed, the process was reversed and the propellers and shafts reinstalled in the vessel.

While working on the coupling involved in reinstalling one of the shafts, a scaffold was erected from which Allen fell. The Court found in effect that the scaffold was defectively fabricated by Dravo thus causing the *MARINER* to be unseaworthy. For the purposes of this application, it may be assumed that these findings are fully supported by the record.

At no time during the course of the work performed by Dravo on the *MARINER* was any crew member of the vessel required or permitted to perform any duties in connection with the repairs being accomplished by Dravo.

The entire reach of the area in which the scaffold was erected was and had been in the exclusive control and custody of Dravo since the commencement of the repair work.

The work in question was highly specialized, and Dravo sent one of its Mechanical Supervisors from its main yard in Pittsburgh to supervise the work on the *MARINER*. Both this witness, Mr. Phillips, and the Chief Engineer of the MARINER testified that the work being performed was not of the type that could be performed by the crew of a vessel. This evidence is uncontradicted.

Not only is this clear from the record, but apparently the District Judge was in agreement that the work in question could not have been done by the ship's crew. In a colloquy between counsel for Union Barge Line and the Court regarding the relevancy of this evidence, counsel remarked, "My purpose is, Your Honor, to show that this is work that could not be done by the vessel's crew and that it necessitated a shipyard and shipyard employees and shipyard equipment." The Court replied, "I don't think there is any question about that." (Tr. 395)

However, in the face of this fact situation, Judge E. Gordon West held "that libellant was performing work traditionally performed by a seaman, and that he was, at the time of his injury, entitled to the warranty of seaworthiness." He further concluded that Allen was entitled to recover damages from Union Barge Line, as owner of the *MARINER*, because of a breach of the warranty of seaworthiness; and Union Barge Line was in turn allowed recovery over against Dravo for the amount of the decree, plus interest, costs and reasonable attorney's fees.

The case was orally argued before the United States Court of Appeals for the Fifth Circuit on April 20, 1966.

After an interval of a month, the Court published as one sentence *per curiam* affirmance, without any assigned reasons despite the blunt dissenting opinion of Circuit Judge Jones. Thereafter, a petition for rehearing was timely filed and subsequently the Court of Appeals entered its order denying the rehearing without opinion. Both Union Barge Line and Dravo have joined in this application for *certiorari*.

REASONS FOR GRANTING THE WRIT

It is respectfully submitted that the writ sought by petitioners should be granted for the reason that the decision of the Court of Appeals for the Fifth Circuit in its *per curiam* affirmance of the trial judge's decision, has, in the words of Rule 19 of the Supreme Court Rules, so far sanctioned such a departure from the usual course of judicial proceedings by a lower court as to call for an exercise of the Supreme Court's power of supervision. The departure was the Trial Judge's statement that the extensive repairs being performed on the *MARINER* constituted normal routine maintenance, phrasing the statement as a Finding of Fact, when in truth such a Finding masked the real legal issue in the case: whether the rule of *Lawlor v. Socony-Vacuum Oil Company*, 275 F. 2d 599 (2d Cir. 1960) was to be extended to cover major repair situations.

Furthermore, Rule 19 sets out another reason for granting certiorari in this case. The decision below decided a federal question, a question of the admiralty jurisdiction, in such a way as to bring the result in conflict with the ruling decision of this Court, namely *West v. United States*, 361 U.S. 118, 80 S. Ct. 189, 4 L. Ed. 2d 161 (1959) and its holding that the warranty of seaworthiness is not due when the undertaking involves major repairs entailing extensive work of a specialized nature.

Furthermore, this is an instance "where a Court of Appeals has rendered a decision in conflict with the decision of another Court of Appeals on the same matter", since the Fifth Circuit, in adopting the Trial Judge's opinion as its own, necessarily endorsed the precedent breaking decision that a vessel out of water in drydock was "in navigation".

ARGUMENT

The doctrine of seaworthiness has no application at all, and occasion for the application of the "ship's service" or any other test cannot even arise, if the ship is in fact out of navigation. As this Court stated in *Roper v. United States*, 368 U.S. 20, 24 n. 3, 82 S. Ct. 5, 7 n. 3, 7 L. Ed. 2d 1 (1961),

> "The view that a vessel not in navigation extends no warranty has often been expressed in the more familiar context of to whom does the warranty extend. E.g., *Union Carbide Corp. v. Goett*, 4 Cir., 1958, 256 F. 2d 449. Implicit within such cases is the reasoning that those working on vessels not in navigation are not seamen (or doing seamen's work) and consequently not among those employees protected by the warranty of seaworthiness."

This is a restatement of the legal formula which has led courts in various circuits to reject the applicability of the warranty of seaworthiness doctrine when a ship has been hoisted high out of the waters of navigation into drydock.

In *Raidy v. United States*, 252 F. 2d 117 (4th Cir. 1958) *cert.* denied 356 U.S. 973, 78 S. Ct. 1136, 2 L. Ed. 2d 1147 (1958) the Court dismissed the libel of a shipyard worker who was injured when he slipped and fell on a vessel which lay in drydock. The Court held that Raidy's status was different from that of a seaman, since,

> "The ship was in drydock for structural changes which could not have been performed by the crew. In fact the crew had been discharged long before the accident occurred. The ship at the time was not subjected to any perils of navigation. In fact it had necessarily been withdrawn from navigation for a long period."

In *Berryhill v. Pacific Far East Line*, 238 F. 2d 385 (9th Cir. 1956), *cert.* denied 354 U.S. 938, 77 S. Ct. 1400, 1 L. Ed. 2d 1537 (1957) the Court denied recovery to a shoreside machinist who was injured while working on a drydocked ship, stating that,

> "The Courts have recognized the distinction between the protection required by a seaman, and one who works on a ship cradled on dry land. The very reason for the rule of absolute liability ends when the vessel is not on water."

It is true that the Trial Judge phrased his conclusion that the *MARINER* was not in navigation as a finding of fact. But a "finding of fact" is a coat of many colors. It does not cover a conclusion drawn from uncontroverted happenings. The salient fact in this case is uncontroverted: Allen was injured while the vessel was still in drydock, where it lay out of the water, with its very means of locomotion ripped out. This was not a vessel in navigation, and no warranty of seaworthiness is owed to anyone unless the vessel is in navigation. A "finding of fact" that a warranty of seaworthiness was due to Allen is in reality a conclusion of law, and an erroneous one at that.

The facts represented on the record in this case are strikingly similar to the facts presented to this Court in *United N. Y. & N. J. Sandy Hook Pilots Assn. v. Halecki*, 358 U.S. 613, 79 S. Ct. 517, 3 L. Ed. 2d 541 (1959) where the Court stated,

> "The work that he did was in no way the type of work traditionally done by the ship's crew. It was work that could not even be performed upon a ship ready for sea, but only when the ship was dead with its generators dismantled. Moreover, it was the work of a specialist, requiring special skill and special equipment — portable blowers, air hoses, gas masks, and tanks of carbon tetrachloride, all brought aboard the vessel for this special purpose, and none connected with the ship's seagoing operations. Indeed, the work was so specialized that the repair yard engaged to overhaul the vessel was not itself equipped to perform it, but had to enlist the services of a subcontractor."

The removal and reinstallation of propeller shafts is not the type of work that can be performed on a ship ready for sea. It is the sort of job that can only be done when the ship is dead, out of navigation, and is high and dry in dock. Moreover, it is the sort of job that requires the attention of a specialist, with special skills and equipment, in this case Gantry cranes and special cutting equipment — all of which were connected with the special repair job in question, and not with getting under way or navigating. Indeed, the work was so specialized that the repair yard engaged to overhaul the vessel called in the Company's special supervisor from Pennsylvania.

Another aspect of the legal standard to be applied in determining whether a warranty of seaworthiness is owed hinges on the extent of the repairs and the exclusiveness of the control of the vessel. In *West v. United States, supra*, this Court rejected West's claim, stating,

> "The Mary Austin, as anyone could see, was not in maritime service. She was undergoing major repairs and complete renovation, as the petitioner knew. Furthermore he took his orders from the contractor, not the shipowner. He knew who was

> in control. This undertaking was not ship's work but a complete overhaul of such nature, magnitude, and importance as to require the vessel to be turned over to a ship repair contractor and docked at its pier for the sole purpose of making her seaworthy. It would be an unfair contradiction to say that the owner held the vessel out as seaworthy in such a case. It would appear that the focus would be upon the status of the ship, the pattern of the repairs, and the extensive nature of the work contracted to be done, rather than the specific type of work that each of the numerous shore-based workmen is doing on shipboard at the moment of injury. The job analysis which the latter would call for would lead to fortuitous results."

This test of the extent of repairs was made more explicit in *Lawlor v. Socony-Vacuum Oil Company, supra*, in which the Court of Appeals for the Second Circuit allowed recovery to a repairman working aboard ship on the basis of the applicability of the warranty. There, the tank vessel *Mobilfuel* had been put in dry dock for customary repairs, including painting of the propeller and bottom. After this work was finished, the vessel was taken out of drydock, manned by her crew, and moored alongside a pier for further work involving miscellaneous small items. It was during this phase of the overall repairs that the accident occurred. The Court emphasized that no structural changes were to be made, that the crew of the vessel owner had put the ship back in navigation, that the work being performed under the contract at the time the injury was sustained did not call for anything in the nature of a major or substantial item of change or repair, and, most important, that the vessel was equipped to permit her crew to do the same work while at sea.

How different are the facts in this case! The *MARINER* was not in navigation. Allen was injured while work-

ing on a scaffold which was to aid in reinstalling a propeller shaft so heavy that it had to be lifted by a Gantry crane following its removal to the machine shop, the use of special equipment, and all under the supervision of one of Dravo's Mechanical Supervisors from the main yard in Pittsburgh. This was not work traditionally performed by a seaman. It could not be. No equipment exists aboard any vessel which enables that vessel's crew to remove the propellers and shafts.

It is true that elements of the galley crew and an engine room watch were aboard, but not one of these men was part of the deck crew which controls the navigation of the vessel. In fact, these crew members had been instructed not to interfere with or participate in any way with the repair work being performed by the shipyard. There is no question but that the vessel owner did not have control of the vessel, so there existed the very opposite of the situation in *Lawlor* to which the Trial Judge compared this case, because there the vessel contained a full complement of officers and men who remained aboard performing seamen's duties while the auxiliary repairs were finished. This is not a case where a shipyard worker on board a vessel is injured as a result of a vessel hazard as opposed to a shipyard hazard. Allen has a remedy against his employer, Dravo, and should be remitted to this remedy.

It is submitted that the facts presented on the record in this case fall squarely within the guidelines of the well established line of cases which have held that there is no warranty of seaworthiness in major repair situations. Allen's injury did not occur because of some latent defect in the vessel. The vessel was put in the shipyard to be repaired, and the scaffolding upon which Allen was injured was constructed by the shipyard for the purpose of carry-

ing out these repairs. As this Court stated in *West v. United States, supra,*

> "It appears manifestly unfair to apply the requirement of a safe place to work to the shipowner when he has no control over the ship or the repairs, and the work of repair in effect creates the danger which makes the place unsafe. The respondent, having hired Atlantic to perform the overhaul and reconditioning of the vessel — including the testing — was under no duty to protect petitioner from risks that were inherent in the carrying out of the contract. The Courts of Appeals seem to have followed this rule. See *Filipek v. Moore-McCormack Lines*, 2 Cir., 258 F. 2d 734. Although some of respondent's employees were on board the ship here, this would not attach liability since they gave no orders, and did not participate in the work or supervise its progress, but were simply inspectors or observers. *Id.*, at page 737."

The facts presented on the record in this case bring the vessel owner within the above stated rationale.

Petitioners contend that on the facts of the record, the findings of the Trial Judge are contrary to the guidelines established by previous Supreme Court cases. The decision and findings in this case go against the "major repairs and control" test set out in *West* and *Lawlor* and against the "out of navigation" test of *Halecki, Roper, Raidy,* and *Berryhill.* Petitioners contend that the Trial Judge applied the standards set forth in *West* and *Lawlor* incorrectly when he held that a vessel raised out of the water in drydock was still in navigation, and that this holding brought the decisions of the Fifth Circuit in conflict with the decisions of the Second Circuit. Petitioners contend that the Trial Judge's decision in this case is in conflict with the applicable Admiralty decisions of this Court, and that the affirmance by the Court of Appeals sanctioned such a de-

parture from the usual course of proceedings as to call for an exercise of this Court's power of supervision.

CONCLUSION

For the foregoing reasons, a writ of *certiorari* should issue herein to the end that the judgment of the Court of Appeals for the Fifth Circuit should be reversed.

Respectfully submitted,

GEORGE B. MATTHEWS of
LEMLE & KELLEHER,
1836 National Bank of
Commerce Building,
New Orleans, Louisiana.

W. FORD REESE,
GEORGE V. BAUS of
ADAMS AND REESE,
846 National Bank of
Commerce Building,
New Orleans, Louisiana.

CERTIFICATION OF SERVICE

I hereby certify that a copy of the foregoing has been duly served on opposing counsel by depositing the same in the United States mail, postage prepaid, addressed to them at their office.

New Orleans, Louisiana, _____ _____, 1966.

GEORGE B. MATTHEWS

APPENDIX "A"

OPINION OF DISTRICT COURT

(Title and Number Omitted) (Filed: March 30, 1965)

WEST, District Judge:

Libelant, Walter M. Allen, was employed by Dravo Corporation in a capacity which he described as a "handy man," but which actually appears to be that of a shipfitter. Dravo is a corporation engaged in the business of performing maintenance work, repair work, dry-docking, etc. of seagoing and other vessels. On March 23, 1963, while libelant was working aboard the M/V MARINER, a towboat owned and operated by respondent, Union Barge Line Corporation, he was injured when a scaffold upon which he was working collapsed. He brings this libel against the Union Barge Line Corporation, as the owner of the M/V MARINER, and also against the M/V MARINER in rem, alleging that his injuries were caused by the negligence of Union and by the unseaworthiness of the vessel, M/V MARINER. He also libels Aetna Casualty and Surety Company as the liability insurer of Union, and as the liability insurer of the directors, supervisors, stockholders, agents, employees, and representatives of Dravo Corporation, whom he contends were individually guilty of negligence proximately causing his injuries. Union answered admitting ownership of the MARINER; denying negligence; denying that the MARINER was in any way unseaworthy; and alleging that the accident was caused entirely by the fault and negligence of libelant. Aetna answered admitting its insurance coverage of both Union and Dravo; denying negligence on the part of Union; denying that the MARINER was unseaworthy; and alleging that the libelant had assumed the risk of his employ-

ment and that the accident was caused by his own negligence. As insurer of Dravo, Aetna also contends that libelant's exclusive remedy lies under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, and that there was no independent negligence on the part of the directors, supervisors, stockholders, agents, employees, and representatives of Dravo causing or contributing to the cause of libelant's injury.

Union, and its insurer, Aetna, also filed a petition under the 56th Admiralty Rule against Dravo, seeking indemnity for any sums that they, or either of them, might be ordered to pay libelant as a result of this accident on the ground that if the MARINER was unseaworthy she was unseaworthy only because Dravo failed to perform its contract of repair in a workmanlike manner. Dravo answered the 56th Rule petition denying all allegations of negligence and alleging that it performed its work on the MARINER in a workmanlike manner. Aetna then, as Dravo's compensation insurer, filed an intervening libel, seeking reimbursement from libelant, Union and the MARINER, for all money paid to libelant under the Longshoremen's and Harbor Workers' Compensation Act in the event libelant is granted recovery in this suit. In this posture, and after pretrial conference, the case came on for trial on November 2, 1964, following which briefs were filed by counsel for all parties. Now, after carefully considering the record herein, the evidence adduced at trial, and the arguments and briefs of counsel, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. On March 16, 1963, the M/V MARINER, a towboat owned and operated by respondent, Union Barge Line Corporation, arrived at the repair facilities of Dravo Cor-

poration on the Mississippi River at Baton Rouge, Louisiana, to receive its routine annual maintenance servicing which Dravo had contracted to perform. Included among the items of maintenance and repair to be performed by Dravo were such things as cleaning gate valves; fabricating a steel grating walkway at the after end of the pilothouse; fabricating and installing pipe storage rack in the shaft alley; installing grab rails in showers; installing new towing kevels; washing down engine room; removing accumulated sludge; installing rubbing bars on port and starboard stern; installing a closed jacket water cooling system; and removing propeller shafts and installing new sleeves thereon.

2. Dravo contracted to perform all work called for by its contract with Union in "a good and workmanlike manner."

3. The M/V MARINER arrived at the Dravo repair facility on March 16, 1963, and was placed in a floating drydock on March 18, 1963. She was returned to the water on March 25, 1963, and left the repair yard, with all repairs and maintenance completed on April 4, 1963.

4. Libelant boarded the M/V MARINER on March 23, 1963, as an employee of Dravo. He was to assist in the removal of the propeller shafts by removing the couplings therefrom.

5. The M/V MARINER is a 192 foot long diesel powered push boat. She has twin screws with her two shafts separated by a centerline bulkhead. This bulkhead has an opening at each end to provide access from one shaft alley to the other. There was, at the time of the accident, no walkway along the shafts. To inspect the shafts it was necessary to walk along the hull braces which were

four or five feet below the level of the shafts. Each shaft had three carrier bearings in the shaft alley and one bearing at the bulkhead separating the engine room from the shaft alley. The shafts are approximately 13 inches in diameter, and each half of the couplings or bearings weigh approximately 350 pounds.

6. While either removing or replacing a coupling from the shaft, libelant was working on a scaffold, which had been erected to facilitate working on the shaft, when it collapsed causing him to fall four or five feet to the bottom of the hull where he landed astraddle of an angle iron brace, causing him severe injury.

7. The scaffolding was furnished and erected in the shaft alley by Dravo prior to its use by libelant.

8. The scaffolding was defective in that one of the 2 x 4's used to support the plywood platform had a large knot in it and it was because of this defective 2 x 4 that the scaffold collapsed causing libelant's injury.

9. The defect in the lumber would not have been noticeable even by reasonable inspection, and libelant was not guilty of any negligence whatsoever which in any way caused or contributed to the cause of this accident.

10. The work being done on the M/V MARINER at the time of this accident was nothing but usual, routine maintenance work such as is performed on the vessel every year or two. The performance of this work did not take the vessel out of navigation.

11. While it is true that the entire crew did not remain aboard during the repair period, the entire engine room crew and the galley crew did remain aboard and did perform their regular duties during the entire time.

12. The defective scaffolding from which the libelant fell and injured himself created an unseaworthy condition aboard the M/V MARINER, which unseaworthy condition was caused entirely by the negligence of Dravo Corporation resulting in their failure to perform their work under their contract with Union in a workmanlike manner.

13. Respondent, Union Barge Line Corporation, was not guilty of any negligence causing or contributing to the cause of this accident.

14. Libelant was 40 years old at the time of his injury. He had a congenital defect in his spine at the fifth lumbar interspace, which defect, in all probability, made him more susceptible to injury than he would otherwise have been.

15. About 14 years prior to this accident, in 1950, while working for an oil well drilling company, libelant injured his back and was more or less incapacitated for about 17 weeks. But the injury suffered by him at that time was to the upper back, in the cervical region. He has never before had any trouble with his lower back.

16. Libelant's prior work record was not consistent with prior lower back trouble. He has, over the past years, worked regularly as a pipefitter, mechanic, welder, operator of heavy equipment, truck driver, etc. While at the time of his accident he was described as doing the work of a shipfitter, he himself described his work as that of a "handy man," consisting of mechanical work, electrical work, crane operator, or "anything else assigned to him."

17. As a direct and proximate result of this accident, libelant suffered what is, in all probability, according to the overwhelming weight of the medical testimony, a herniation of the fourth lumbar disc with a compression

of the fifth lumbar nerve. He is, and has been since the occurrence of this accident, unable to do any heavy manual work, and is unable to do the type of work which he has done for a living for the past 14 years.

18. During libelant's employment with Dravo, his average income from his employment was something over $5,000 per year. He was earning $2.70 per hour at the time of his injury. Since this accident he has been unemployed, his only income being $1,850 paid by Aetna Casualty and Surety Company, as insurer of Dravo Corporation, under the Longshoremen's and Harbor Workers' Compensation Act. His medical expenses to date, in the total sum of $482.46, have also been paid by Aetna, as insurer of Dravo, and pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act.

19. Libelant has refused, and still refuses to undergo surgery for the correction of the disc and nerve injury despite the fact that such surgery is recommended by all doctors concerned.

20. Statistics establish the fact that between 60 and 70 per cent of those undergoing similar surgical procedures to those recommended in this case fully recover from their disability while approximately 10 per cent will experience no improvement in their condition at all after surgery. The remainder will have a limited amount of disability insofar as performing heavy manual work even after surgery. There have been isolated cases where, after such surgery, the patient has been worse off than he was before surgery, but this is extremely rare. According to all of the medical testimony, the odds are overwhelmingly in favor of libelant's condition being substantially improved if the recommended surgery is performed. The surgical procedures recommended, i.e., repair of the ruptured inter-

vetebral disc, together with a spinal fusion, is not an unusual or rare procedure but is one that is being performed daily, with increasing frequency throughout the world. Even though libelant refuses, at this time, to submit to such surgery, he does indicate, and the Court believes, that he will, if his back trouble continues, submit to such procedures for he says that he will only submit to surgery "as a last resort."

CONCLUSIONS OF LAW

1. The Court has jurisdiction over this matter under its admiralty and general maritime jurisdiction, and venue is properly laid in the Eastern District of Louisiana.

2. The warranty of seaworthiness owed by a shipowner to the members of its crew is a non-delegable duty and is extended also to longshoremen engaged in the loading and unloading of the vessel. *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 66 S. Ct. 872, 90 L. Ed. 1099 (1946). It is also extended to shore-based workers doing the type of work aboard a vessel in navigation which is customary or traditionally done by seamen, even though they are employed by third parties such as shipyards, marine contractors, etc. *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 74 S. Ct. 202, 98 L. Ed. 143 (1953). *The Tungus v. The Skovgaard*, 358 U.S. 588, 79 S. Ct. 503, 3 L. Ed. (2d) 524 (1959); *Pinion v. Mississippi Shipping Co.*, 156 F. Supp. 652 (E.D. La. 1957).

3. To determine whether or not the warranty of seaworthiness is extended to a shore-based worker who performs labor on a ship which is not ready for a voyage but is docked in a private shipyard for repairs, overhaul, or maintenance, the focus should be upon the status of the ship, the pattern of the repairs, and the extensive nature

of the work contracted to be done rather than upon the specific type of work that each shore-based workman is doing on shipboard at the moment of injury. *West v. United States*, 361 U.S. 118, 80 S. Ct. 189, 4 L. Ed. (2d) 161 (1959). The character of the work to be done by the shipyard must be considered as must the presence or absence of a crew performing the customary work of seamen on shipboard and the consequent measure of control or lack of control by the shipyard over the vessel as a whole. *Lawlor v. Socony-Vacuum Oil Co.*, 275 F. 2d 599 (CA 2 1960) *cert. den.* 368 U.S. 844, 80 S. Ct. 1614, 4 L. Ed. (2d) 1728 (1960).

4. After considering all of these elements, the Court concludes as a matter of law, that in view of the pattern of the repairs and the nature of the work to be done by both Dravo and the engineering crew aboard, the M/V MARINER was a vessel in navigation at the time of libelant's injury; that libelant was performing work traditionally performed by seamen (removing a bearing from a propeller shaft); and that he was, at the time of his injury, entitled to the warranty of seaworthiness. *Lawlor v. Socony-Vacuum Oil Co., supra.*

5. The defective lumber used in the scaffold on which libelant was required to work caused the M/V MARINER to be unseaworthy and the unseaworthy condition was the proximate cause of libelant's injury.

6. In view of Union's non-delegable duty to furnish a seaworthy vessel to all to whom the warranty of seaworthiness is extended, Union Barge Line Corporation, as owner and operator of the M/V MARINER at the time of libelant's injury is liable to him for all damages sustained by him as a result of this unseaworthy condition. *Ballwanz v. Isthmian Lines*, 319 F. 2d 457 (CA 4 1963);

Thompson v. Calmar S.S. Corporation, 331 F. 2d 657 (CA 3 1964); *Provenza v. American Export Lines, Inc.*, 324 F. 2d 660 (CA 4 1963).

7. Since the Court has found, as a fact, that the unseaworthy condition causing libelant's injury was caused entirely by the failure of Dravo Corporation to perform its work under its contract with Union in a workmanlike manner, Dravo is liable over to Union for the full amount of the award herein made to libelant, together with costs and reasonable attorney fees. *Ryan Stevedoring Co., Inc., v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124, 76 S. Ct. 232, 100 L. Ed. 133 (1956).

8. As a matter of law, Aetna Casualty and Surety Company, as intervenor, is entitled to recover from libelant all amounts paid as compensation and for medical expenses to libelant pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act.

9. The award of damages for personal injuries is of necessity somewhat arbitrary and varies greatly with the facts and circumstances of each case. *Dark v. Brinkman*, 136 So. 2d 463 (La. App. 3rd Cir. 1962). In trying to assess the amount of future loss of earnings as well as probable future pain and suffering, the totality of circumstances must be considered. After a careful consideration of all of the factors involved in this case, it is concluded that, as a matter of law, libelant is entitled to recover from Union Barge Line Corporation and Aetna Casualty and Surety Company, in solido, the sum of $45,000 for all elements of damage resulting from this accident, including all past, present and future medical expenses, pain and suffering, disability, loss of earnings, and any and all other damages of any kind resulting from this accident. Judgment will also be rendered herein in

favor of Union and its insurer, Aetna, and against Dravo for the full amount of the award hereby made in favor of libelant, together with costs and a reasonable attorney fee, and in the event the amount of the attorney fee cannot be agreed upon by counsel, the question of the amount of the fee will be submitted to the Court for determination. Judgment will be rendered against libelant, Union and the M/V MARINER, and in favor of Aetna as Dravo's compensation insurer, for the total amount of compensation and medical payments made to libelant under the Longshoremen's and Harbor Workers' Compensation Act.

Counsel are requested to submit to the Court a proposed form of judgment to be entered in accordance herewith.

Baton Rouge, Louisiana, March 30, 1965.

/s/ E. Gordon West
UNITED STATES DISTRICT JUDGE

(Title and Number Omitted) (Filed: April 12, 1965)

FINAL DECREE

The above entitled action having come on for trial in this Court on the 2nd and 3rd days of November, 1964, the parties having appeared by their respective counsel, and the Court, after all of the proof of the parties had been taken and briefs filed, having rendered its opinion and made its findings of fact and conclusions of law, filed herein under date of March 30, 1965, it is:

ORDERED, ADJUDGED AND DECREED that Walter M. Allen have and judgment is hereby rendered herein in his favor against Union Barge Line Corporation and Aetna Casualty And Surety Company, in solido and against the M/V MARINER in rem, for the sum of FORTY-FIVE THOUSAND AND NO/100 ($45,000.00) DOLLARS, together with interest at the rate of five (5%) per cent from judicial demand and all costs;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that judgment be and the same is hereby rendered in favor of Union Barge Line Corporation and Aetna Casualty and Surety Company, against Dravo Corporation in the sum of FORTY-FIVE THOUSAND AND NO/100 ($45,000.00) DOLLARS, together with interest at the rate of five (5%) per cent from date of judicial demand and all costs, plus attorneys fees in the amount of TWO THOUSAND AND NO/100 ($2,000.00) DOLLARS.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that judgment be and same is hereby rendered herein in favor of Aetna Casualty and Surety Company and against Walter M. Allen, libelant, Union Barge Line Corporation ahd (sic) the M/V MARINER in the sum of

TWO THOUSAND THREE HUNDRED THIRTY-TWO AND 46/100 ($2,332.46) DOLLARS, being the amounts previously paid to libelant by Aetna Casualty and Surety Corporation and the M/V MARINER in the sum of the Longshoremen and Harbor Workers' Act.

THUS DONE AND SIGNED in Open Court on this 19th day of April, 1965, at Baton Rouge, Louisiana.

/s/ E. Gordon West

JUDGE, THE UNITED STATES DISTRICT COURT

APPENDIX "B"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 22763

UNION BARGE LINE CORPORATION and
AETNA CASUALTY AND SURETY COMPANY,
Appellants,

versus

WALTER M. ALLEN,
Appellee.

WALTER M. ALLEN,
Appellant,

versus

UNION BARGE LINE CORPORATION, AETNA
CASUALTY AND SURETY COMPANY,
and the M/V MARINER,
Appellees.

DRAVO CORPORATION,
Appellant,

versus

UNION BARGE LINE CORPORATION and
AETNA CASUALTY AND SURETY COMPANY,
Appellees.

Appeals from the United States District Court for the Eastern District of Louisiana.

(May 24, 1966.)

Before JONES and GEWIN, Circuit Judges, and
HUNTER, District Judge.

PER CURIAM: We find ourselves in agreement with the opinion and decision of the District Court reported in 239 F. Supp. at p. 1004.

The judgment is therefore AFFIRMED.

JONES, Circuit Judge, Dissenting

The facts are set forth in the district court's findings. *Allen v. Union Barge Line Corporation*, 239 F. Supp. 1004. The M/V Mariner was in drydock undergoing an overhaul. Dravo Corporation was doing the work. Allen was its employee. Allen was on a scaffold erected by Dravo. Allen was engaged in the removal of the propeller shaft and specifically was either taking off or putting on a coupler bearing. The scaffold collapsed and he was hurt. I cannot agree that the vessel was in navigation or that Allen was engaged in work customarily performed by seamen. To affirm, as the majority does, seems to me an unwarranted extension of the doctrines announced in *Ryan*[1] and *Sieracki*,[2] therefore I

DISSENT.

---

[1] Ryan Stevedoring Co., Inc. v. Pan-Atlantic SS Corporation, 350 U.S. 124, 76 S. Ct. 232, 100 L. Ed. 133.

[2] Seas Shipping Co. v. Sieracki, 328 U.S. 85, 66 S. Ct. 872, 90 L. Ed. 1099.

APPENDIX "C"

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1965

No. 22763

D. C. Docket No. 739-Admiralty

UNION BARGE LINE CORPORATION and
AETNA CASUALTY AND SURETY COMPANY,
Appellants,

versus

WALTER M. ALLEN,
Appellee.

WALTER M. ALLEN,
Appellant,

versus

UNION BARGE LINE CORPORATION,
AETNA CASUALTY AND SURETY COMPANY,
and the M/V MARINER,
Appellees.

DRAVO CORPORATION,
Appellant,

versus

UNION BARGE LINE CORPORATION and
AETNA CASUALTY AND SURETY COMPANY,
Appellees.

Appeals from the United States District Court for the Eastern District of Louisiana.

Before JONES and GEWIN, Circuit Judges, and
HUNTER, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellants-appellees, Union Barge Line Corporation and Aetna Casualty and Surety Company, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

JONES, Circuit Judge, dissents.

May 24, 1966

Issued as Mandate:

APPENDIX "D"

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Office of the Clerk

EDWARD W. WADSWORTH
Clerk

Room 408 — 400 Royal Street
New Orleans, La. 70130

August 29, 1966

Re: No. 22763—Union Barge Line Corp. and Aetna Casualty and Surety Company vs. Walter M. Allen; Walter M. Allen Vs. Union Barge Line Corp., Aetna Casualty and Surety Co. and the M/V Mariner; Dravo Corp. vs. Union Barge Line Corp. and Aetna Casualty and Surety Co.

Gentlemen:

You are hereby advised that the court has today entered an order denying the Petition for Rehearing in the above case. No opinion was rendered in connection therewith.

Jones, C. J. Dissenting.

(Stamped) EDWARD W. WADSWORTH
EDWARD W. WADSWORTH
Clerk

Mr. George B. Matthews
Attorney at Law
New Orleans, La.

Mr. George V. Baus
Attorney at Law
New Orleans, La.

Mr. John L. Avant
Attorney at Law
Baton Rouge, La.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 22763

UNION BARGE LINE CORPORATION and
AETNA CASUALTY AND SURETY COMPANY,
Appellants,

VS.

WALTER M. ALLEN,
Appellee.

WALTER M. ALLEN,
Appellant,

VS.

UNION BARGE LINE CORPORATION,
AETNA CASUALTY AND SURETY COMPANY,
AND THE M/V MARINER,
Appellees.

DRAVO CORPORATION,
Appellant,

VS.

UNION BARGE LINE CORPORATION,
AETNA CASUALTY AND SURETY COMPANY,
Appellees.

Appeals from the United States District Court for the Eastern District of Louisiana.

(August 29, 1966)

ON PETITION FOR REHEARING

Before JONES and GEWIN, Circuit Judges, and HUNTER, District Judge.

PER CURIAM.

Upon considering the petitions for rehearing filed by Appellants, it is ordered and decreed that same be and are hereby

DENIED.

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
DEC 27 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 763

**UNION BARGE LINE CORPORATION,
DRAVO CORPORATION and
AETNA CASUALTY AND SURETY COMPANY,**
Petitioners,

versus

WALTER M. ALLEN,
Respondent.

OPPOSITION IN BEHALF OF WALTER M. ALLEN TO THE PETITION FOR A WRIT OF CERTIORARI.

C. PAUL BARKER,
JOHN L. AVANT of
DODD, HIRSCH, BARKER,
AVANT & WALL,
429 Government Street,
P. O. Box 967,
Baton Rouge, Louisiana 70821,
Attorneys for Walter M. Allen.

HAUSER-AMERICAN, "LEGAL PRINTERS", 441 GRAVIER STREET, NEW ORLEANS, LA.

INDEX

	PAGE
Authorities Cited	i
Opposition of Walter M. Allen to Petition for Writ of Certiorari	2
Question Presented	2
Statement of the Case	2
Argument	3
Conclusion	18
Certificate	19

AUTHORITIES CITED

Cases

Berryhill v. Pacific Far East Line, 238 F. 2d 385 (9th Cir. 1956), cert. denied 354 U.S. 938, 77 S. Ct. 1400, 1 L. Ed. 2d 1537 (1957) 17

Lawlor v. Socony-Vacuum Oil Company, (2d Cir. 1960), 275 F. 2d 599 ..... 11, 15

Raidy v. United States, 252 F. 2d 117 (4th Cir. 1958) cert. denied 356 U.S. 973, 78 S. Ct. 1136, 2 L. Ed. 2d 1147 (1958) 17

Roper v. United States, 82 S. Ct. 5, 368 U.S. 20 ..... 5, 9, 10, 14, 16

Seas Shipping Co. v. Sieracki, 328 U.S. 878, 66 S. Ct. 872 9

United N. Y. & N. J. Sandy Hook Pilots Assn. v. Halecki, 358 U.S. 613, 79 S. Ct. 517, 3 L. Ed. 2d 541 (1959) 17

West v. United States, 80 S. Ct. 189, 361 U.S. 118 ..... 5, 9, 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 763

UNION BARGE LINE CORPORATION,
DRAVO CORPORATION and
AETNA CASUALTY AND SURETY COMPANY,
Petitioners,

versus

WALTER M. ALLEN,
Respondent.

OPPOSITION IN BEHALF OF WALTER M. ALLEN TO THE PETITION FOR A WRIT OF CERTIORARI.

May It Please the Court:

Applicants, Union Barge Line Corporation, Dravo Corporation and Aetna Casualty and Surety Company, petition this Honorable Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit. Petitioners' reference to the opinions of the Court below and statement as to the jurisdiction of this Honorable Court are correctly stated on Page 2 of the petition.

QUESTION PRESENTED

The question stated by applicants to be presented by the petition for certiorari is somewhat different from the question presented to the Honorable, the United States Court of Appeals for the Fifth Circuit. The question as stated in the petition is:

> "Whether or not a land based shipyard worker * * * was engaged in work traditionally performed by a crewmember *on a vessel in navigation* so as to entitle the injured worker to invoke the doctrine of unseaworthiness."
>
> (Italics Counsel's)

For the reasons hereinafter stated, it is respectfully submitted that the question of whether or not the M/V MARINER was a vessel in navigation is not properly before this Court on the application for certiorari.

STATEMENT OF THE CASE

The evidence shows that the M/V MARINER was in the Dravo shipyard in Baton Rouge, Louisiana, for repairs. These repairs are referred to as "extensive" on Page 3 of the petition for certiorari. The nature of these repairs is a factual issue in the case, resolved adversely to petitioners by the Lower Court. The soundness of the Lower Court's decision as to this factual matter will be further documented herein.

Further, in petitioners' statement of the case they say:

> "At no time during the course of the work performed by Dravo on the MARINER was any crew member of the vessel required or permitted to perform any duties in connection with the repairs being accomplished by Dravo.
>
> "*The entire reach of the area in which the scaffold was erected was and had been in the exclusive con-*

trol and custody of Dravo since the commencement of the repair work."

(Italics Counsel's)

Again, it is submitted that the degree of control exercised by the vessel owner, Union, at the time of the repairs in question is a factual matter, likewise resolved adversely to petitioners by the Trial Judge. Similarly, the bases for such resolution will be more adequately discussed in argument.

With the above exceptions as to the "Question Presented" and the "Statement of the Case" as contained in the petition for certiorari, respondent agrees that these portions of the petition are substantially correct.

ARGUMENT

On Page 5 of their petition applicants chastise the Trial Judge for finding as a fact that the repairs being performed on the M/V MARINER "constituted normal routine maintenance." For the Fifth Circuit to affirm such a finding of fact, petitioners state that Court has "so far sanctioned such a departure from the usual course of judicial proceedings by a lower court as to call for an exercise of the Supreme Court's power of supervision."[1] It is respectfully submitted that a mere reference to the record, yea, the testimony of Union's own witness, completely destroys the basis for any such assertion by petitioners. The Court is respectfully referred to the testimony of Union's witness, Mr. Davis (Tr. 368-369), as follows:

"Q. That is a routine operation, is it not, sir?

"A. That is done periodically, yes, sir. That is done occasionally."

* * * * *

[1] See petition for certiorari, p. 5.

"Q. Were there any structural changes made in the hull?

"A. No, sir."

* * * * *

"Q. *Was this routine maintenance operation?*

"A. *That we were doing?*

"Q. *Yes, sir.*

"A. *It was routine.*

"Q. And about how often is that done? About annually?

"A. It would be annually or about every two years I would say.

"Q. *But it was a routine maintenance operation, is that correct?*

"A. *Yes, sir.*"

(Italics Counsel's)

Further, on this score applicants *here* argue that the M/V MARINER was withdrawn from navigation. Respondent is prepared to refute this charge; but, as pointed out previously herein under the title of "Question Presented," this should not be a question before this Honorable Court. The only error assigned by Union in its brief in the United States Court of Appeals appears on Page 2 of that brief as follows:

"ASSIGNMENT OF ERROR

"Union Barge Line Corporation has appealed and submits to the Court that the District Judge was in error in concluding that the work being performed by Dravo on the M/V MARINER was that traditionally performed by a seaman and that Union owed a warranty of seaworthiness to Allen. This brief will be devoted only to that legal issue."

Thus it can be seen that the Trial Court's finding of

fact that the M/V MARINER was a vessel in navigation was not questioned by Union in the Fifth Circuit, Union being content to argue that the work being performed by Allen at the moment of injury was not that traditionally performed by seamen. This admission is further emphasized in Union's brief, Page 6, wherein it is stated:

> "*West*[2] involved work on a vessel which was being reactivated for service after having been placed in moth ball fleet. *This case is not really apposite here since it went off on the fact that the vessel had been withdrawn from navigation.* * * * "
>
> (Footnote and Italics Counsel's)

Hence, Union did not contend in the Fifth Circuit that the M/V MARINER had been withdrawn from navigation, as in *West v. United States*, 80 S. Ct. 189, 361 U.S. 118, and in *Roper v. United States*, 82 S. Ct. 5, 368 U.S. 20. It is submitted this Court will not consider points of law not urged in, nor considered by, the Court below. Thus, we have under consideration Union's sole contention, i.e., that Allen was not doing work traditionally performed by a seaman.

The facts do not support Union.

However, respondent will first refute the "dead ship" argument.

The petition for certiorari attempts to place the MARINER in the category of a "dead ship" as was the case in *West v. United States, supra*, and *Roper v. United States, supra*. The fact that the MARINER was in dry-dock at the time of the accident in question is emphasized so many times that the petition reads as the diary of a traveler on the Sahara. Petitioners argue strenuously that

---

[2] *West v. United States* (1959), 361 U.S. 118, 80 S. Ct. 189.

the presence of the MARINER in drydock; the fact that cranes had to be used to remove her propellers and shaft; and that these items of the ship's equipment were taken to a machine shop destroy her status as a vessel in navigation and convert her into a "dead ship." This, petitioners contend, removes any hope or possibility that persons engaged in such labors could be performing work "traditionally done by seamen." This argument is made in spite of the following facts which are manifest in the record:

(1) The drydock in question was a floating drydock afloat in the Mississippi River (Tr. 408, testimony of Union's witness, Phillips).

(2) The cranes involved, referred to as gantry cranes, were floating cranes, one of which was on the floating drydock itself and the other of which was on a vessel and never went on land (Tr. 410, testimony of Union's witness, Phillips).

(3) The machine shop was a vessel, to-wit, a converted LST (Tr. 410, testimony of Union's witness, Phillips).

The MARINER, as previously stated, was drydocked for her annual overhaul or routine maintenance; no structural changes were made in her hull; and she had arrived at Dravo at 2:00 A.M. on March 16, 1963, from whence she departed on another voyage at 11:00 A.M. on April 4, 1963, nineteen days later. (Log of the vessel MARINER, Tr. 354). At this point it appears pertinent to inquire whether all of these admittedly maritime activities involving multiple vessels operating upon the Mississippi River deprive the MARINER "of her status as a vessel in navigation" and render the warranty of seaworthiness unavailable to those engaged in these particular tasks for the reason such tasks are not "traditionally performed by seamen."

It is submitted that, traditionally, seamen in days of yore performed any and all tasks necessary to keep their vessel afloat, navigable, and capable of discharging her function as a vessel. More recently, with respect to the particular type of vessels involved here, it is a matter of historical fact that in World War II floating drydocks were transported to the far-flung atolls of the Pacific where Naval vessels of greater tonnage than the MARINER received extensive repairs to their hulls and otherwise, these repairs being performed, in many instances, by the Naval personnel sailing on the vessel.

Union can only contend that Allen's work was not "traditionally" performed by Union's seamen; but the historical fact is that other seamen have "traditionally" performed similar tasks.

With respect to the amount of control exercised by Union at the time of the accident in question, it is submitted the record fails to support the statements contained on Pages 3 and 4 of the petition for certiorari. It is true the full crew was not aboard the MARINER when the accident occurred. However, the engine room crew, the cook, and two additional seamen from the sister ship NAVIGATOR were aboard the vessel at the time of the accident. The testimony of the assistant engineer, Mr. Reese, shows that while in Dravo's yard she was inspected every two hours by a crew member on watch. *In fact, this witness testified that these regular watch tours carried the person making them to the very area where Allen was injured, i.e., the shaft alley* (see testimony of Reese, Tr. 375-377). While this may have not been the full extent of the control exercised by Union over the vessel, it is sufficient to refute the contention that Union had *absolutely no control* over the vessel. This was, undoubtedly, one of the factors considered by the Trial Judge in his finding of fact that the

MARINER was not a "dead ship," but was in navigation.

At the precise moment Allen was injured he had just completed removing a coupling from the ship's intermediate shaft. This task was accomplished with a wrench and a sledge hammer and consisted of first removing a number of bolts with these tools and then lifting the coupling with a come-a-long. The accident occurred after the bolts had been removed and while the men were waiting for a come-a-long to be brought to the site (See Allen testimony, Tr. 310-313).

If the focus is to be upon the *precise* task being performed by Allen at the *moment* of injury, the evidence clearly shows that such task was one traditionally performed by seamen. This is clear from the testimony of Union's witness, Mr. Phillips, as follows:

> "Q. Now, this coupling — could this coupling be taken off of this shaft and inspected and the keys removed from the shaft or from the coupling and then re-installed by the crew of the vessel while the vessel was afloat?
>
> "A. You say could that be done? Why definitely it could have been done. I mean if it had to be done,— if it had to be done I imagine they could do it." (Tr. 405)

Thus it can be seen that Allen, using a maul and a wrench, was injured while doing a task which could just as well have been done by the crew.

However, it is submitted that under the decisions of this Honorable Court, once the *status* of the vessel is determined as being that of a ship in navigation, a detailed inquiry into the precise task being performed by each of the shorebased workers is precluded. The decisions make it clear that once this *status* is determined, all engaged in the

repair operation are entitled to the warranty if the status be that of a ship in navigation, and none are entitled to the warranty if the determination of status is otherwise.

The warranty of seaworthiness arises from the vessel's status as such, and extends to all engaged in her service. *Seas Shipping Co. v. Sieracki*, 328 U.S. 878, 66 S. Ct. 872.

Counsel for Union now denies the MARINER'S status as a ship in navigation, although this was conceded by them in the Fifth Circuit. Looking, then, at the work being performed by Dravo, it is seen to include, in addition to the task in which Allen was engaged, such minutiae as (1) washing down engine room, (2) fabricating a steel grating walkway at the after end of the pilot house, (3) installing grab rails in showers, (4) remove accumulated sludge, etc. (See trial court's Findings of Fact, Tr. 452.)

It cannot be denied that "washing down the engine room" and "removing accumulated sludge" are tasks traditionally done by seamen.

Will this Court say that on a given trip to a shipyard a shorebased worker who removes accumulated sludge or washes down the engine room is entitled to the warranty of seaworthiness, but one who assists in installing new sleeves on the vessel's shafts is not?

It is respectfully submitted that under the clear language of this Honorable Court in prior decisions, Your Honors will not so rule.

This is clear from the decisions in *West v. United States*, 80 S. Ct. 189, 361 U.S. 118, and *Roper v. United States*, 82 S. Ct. 5, 368 U.S. 20. Both of these cases involved ships which this Honorable Court held to be "dead ships."

Simply stated, in both *West* and *Roper* it was held, in effect, that the vessels or structures were not ships at all and extended no warranty of seaworthiness to anyone. However, the Court made clear its reasoning which is applicable here. For example, in *West v. United States*, the vessel, the S. S. Mary Austin, was a World War II liberty ship. To quote the opinion, 80 S. Ct. 189, 192:

> " * * * This undertaking was not 'ship's work' but a complete overhaul of such nature, magnitude, and importance as to require the vessel to be turned over to a ship repair contractor and docked at its pier for the sole purpose of making her seaworthy. *It would be an unfair contradiction to say that the owner held the vessel out as seaworthy in such a case. It would appear that the focus should be upon the status of the ship, the pattern of the repairs, and the extensive nature of the work contracted to be done, rather than the specific type of work that each of the numerous shore-based workmen is doing on shipboard at the moment of injury. The job analysis which the latter would call for would lead to fortuitous results.* We, therefore, do not believe that the Sieracki line of cases is applicable, which obviates any necessity of our discussions of situations where the vessels themselves are not in the status of the Mary Austin. *Here there could be no express or implied warranty of seaworthiness to any person.*"
>
> (Italics Counsel's)

In *Roper v. United States*, 82 S. Ct. 5, 7, this Honorable Court stated:

> "Since we are unwilling to upset the trial court's *factual determination* that the S. S. Harry Lane was not a vessel in navigation, it follows that there was no warranty of the ship's seaworthiness. *West v. United States, supra; Kissinger v. United States*, D.C. 1959, 176 F. Supp. 828." * * * *
>
> (Italics Counsel's)

It is respectfully submitted that the Footnote 3 in Justice Clark's opinion in the *Roper* case makes it clear that the warranty is coextensive with the ship's *status* as a vessel in navigation. This footnote in this Honorable Court's opinion is as follows:

> "3. The view that a vessel not in navigation extends no warranty has often been expressed in the more familiar context of to whom does the warranty extend. E.g., *Union Carbide Corp. v. Goett*, 4 Cir., 1958, 256 F. 2d 449. *Implicit within such cases is the reasoning that those working on vessels not in navigation are not seamen (or doing seamen's work) and consequently not among those employees protected by the warranty of seaworthiness.*"
>
> (Italics Counsel's)

Implicit in this footnote is the principle that, *given a ship in navigation, all* engaged in her service are protected by the warranty. This conclusion is fortified by Justice Clark's statement in *West v. United States*, 80 S. Ct. 189, 192:

> "* * * It would appear that the focus should be upon the *status of the ship*, the pattern of the repairs, and the extensive nature of the work contracted to be done, *rather than the specific type of work that each of the numerous shore-based workmen is doing on shipboard at the moment of injury.* The job analysis which the latter would call for would lead to fortuitous results. * * *"
>
> (Italics Counsel's)

It is respectfully submitted that the decision which is determinative of the issues in this case is *Lawlor v. Socony-Vacuum Oil Company* (2d Cir. 1960), 275 F. 2d 599. In that case the vessel was in the yard of Bethlehem Steel Company for the purpose of her annual layup and overhaul. She had entered the yard on June 24 and de-

parted the yard on July 2, *during which interim period she was in drydock for "a few days for the customary repairs to and painting of the bottom, propellers and so on."* (275 F. 2d 599, 601.) Furthermore, "No structural changes in the vessel were to be made, nor did the contract call for anything in the nature of a major or substantial item of change or repair. The total cost of the work was $70,834 and the contract required performance in 14 days." (Ibid.)

In the case at bar, the vessel was in the yard a total of 19 days and was in drydock 7 days. In *Lawlor*, the contract contemplated performance in 14 days, but was actually completed in 9 days.

Counsel will quote at length from *Lawlor* as follows:

> "Thus the critical question in this case is whether or not the fact that the Mobilfuel was moored in navigable waters at the pier of the shipyard during her annual overhaul *gives her a status such that there is no warranty of seaworthiness* and no duty to Lawlor to maintain the vessel and her equipment in a seaworthy condition.
>
> "Before we attempt to ascertain the underlying principle controlling the case and discuss the pertinent authorities, we think one or two observations will simplify the problem. *Thus we cannot see that the case would differ materially as a matter of basic reasoning if the injured man had been one of the crew of the vessel instead of an employee of Bethlehem.* If Lawlor was doing the work traditionally done by seamen, as we have already found to be the case, he is in the same position as a member of the crew. Moreover, we do not think resort to a mere phrase such as 'out of navigation' gets us very far. *Surely a vessel that has hit one of the submerged logs or other floating obstructions that plague our large harbors and has damaged her propellers so*

that she has to be towed to a shipyard for a day or two for repairs before continuing her voyage cannot fairly be said to have so changed her status as to eliminate any duty to the officers and crew on board to maintain the vessel and her equipment in a seaworthy condition until the repairs have been completed. Such a vessel is unable to move under her own power, she is still in navigable waters, and would seem to be no more 'out of navigation' at the pier of a shipyard than she would be if moored to one of the municipal piers, awaiting tugs to move her to a place where the repairs to her propellers could be promptly made. Thus, if being 'out of navigation' is a material factor, everything depends upon what we mean by 'out of navigation' in the context of the doctrine of unseaworthiness. *If we were pressed to decide whether the Mobilfuel was 'out of navigation' in navigable waters moored at the Bethlehem pier, we would say she was not 'out of navigation.'*"

* * * * *

"As said by Mr. Justice Clark:

> 'It would appear that the focus should be upon the status of the ship, the pattern of the repairs, and the extensive nature of the work contracted to be done, rather than the specific type of work that each of the numerous shorebased workmen are doing on shipboard at the moment of injury.'

* * * * *

"Thus we must grope for some rational basis for deciding this case, as we were required to do in the analogous situation of determining what factors brought a vessel within the intent of the general provisions of the Jones Act, 46 U.S.C.A. § 688. Cf. *Bartholomew v. Universe Tankships, Inc.*, 2 Cir., 1959, 263 F. 2d 437.

"We have concluded that the character of the work to be done by the shipyard, the presence or absence of a crew performing the customary work of seamen on shipboard, and the consequent measure of control or lack of control by the shipyard over the vessel as a whole, are the determining factors that rule the decision in this case. Doubtless cases will arise in which the question of fact relative to the degree of control exercised respectively by the shipowner and the shipyard may be difficult of resolution. But here we have no conversion of a prisoner of war transport into a passenger carrier for the families of overseas service men (Lyon v. United States, 2 Cir., 1959, 265 F. 2d 219), nor extensive repairs amounting virtually to the reconstruction and rebuilding of the vessel (Berge, supra), nor a wholly deactivated vessel from the 'moth ball fleet' (West, supra), nothing in the category of major repairs or structural and extensive changes in the vessel, but only a large number of relatively small miscellaneous items such as are generally included in an annual overhaul. While Bethlehem controlled the particular area where the scaffolds and ladders were put up and where the work of locating and repairing the leaks in the tank bulkheads was being performed, the shipowner had general control of the vessel and a full crew of officers and men were aboard. Under these circumstances we hold there was a warranty of seaworthiness by the shipowner running in favor of the crew and also in favor of shore-based workers on the vessel performing work customarily done by seamen."

(Italics Counsel's)

It is interesting to note that certiorari was denied in *Lawlor* by this Honorable Court, 363 U.S. 844, 80 S. Ct. 1614.

It, also, is interesting to note that in *Roper v. United States*, 368 U.S. 20, 82 S. Ct. 5, 7, in Footnote 2 this Hon-

able Court specifically stated that the decision in *Lawlor* was not contrary to its holding as follows:

> " * * * *Lawlor v. Socony-Vacuum Oil Co.*, 2 Cir., 1960, 275 F. 2d 599, is not CONTRA. There minor repairs were underway on an active ship with a full crew aboard."

It is respectfully submitted that *West* and *Roper* are readily distinguishable from the case at bar. In fact, in the *Lawlor* case, *supra*, Judge Medina, in discussing West, referred to the opinion of the Third Circuit therein (which this Honorable Court affirmed) and by footnote quoted that decision, which stated:

> "1. 'It is not as though the "Mary Austin" had finished a voyage and was having repair work done before resuming business again.' *West v. United States*, 3 Cir., 1958, 256 F. 2d 671, 673."
>
> (See *Lawlor v. Socony-Vacuum Oil Company*, 275 F. 2d 599, 603.)

It is respectfully submitted:

(1) The MARINER had just completed a voyage, was in a shipyard for her "routine maintenance", as was stated by her Chief Engineer, Mr. Davis, and upon completion of "routine maintenance" she was off on another voyage. No structural changes were made in her hull. (See Davis testimony, Tr. 369.)

(2) While a full crew was not aboard the vessel, the engineering crew — or a substantial portion thereof — and crewmen from the sister ship NAVIGATOR were aboard the vessel, participating in the repair and maintenance operation and *inspecting every two hours* the precise area where Allen was injured.

(3) While it is true the MARINER was in drydock,

she was in a *floating* drydock, being worked with floating cranes and a floating machine shop.

So, too, was the vessel in *Lawlor* in drydock, undergoing the same type of repairs as was the MARINER, i.e., her bottom, propellers, etc. In *Lawlor*, those repairs could have been accomplished only in drydock, as was the case herein.

(4) Here, libelant was not performing a task requiring the use of a highly specialized substance and equipment. He was doing a task traditionally done by seamen with equipment found on every vessel in the world, while working on a traditional piece of ship's equipment — a scaffold.

It is respectfully submitted that if it were to be held that Allen was not entitled to a seaworthy vessel, when surely the repairmen participating in the same operation, but "washing down engine room" or "removing accumulated sludge", would be so entitled, would be a "fortuitous result" condemned by this Honorable Court in *West, supra.*

In conclusion, it is respectfully submitted that the question of whether or not Allen was entitled to the benefit of the warranty of seaworthiness under the facts and circumstances as presented in this record has been clearly and positively designated by this Honorable Court *as a fact question*, to be disturbed only upon a showing of clear and manifest error. In this connection, Your Honors are referred again to *Roper v. United States*, 82 S. Ct. 5, 7 wherein it is stated:

> "In light of the above circumstances, we cannot say *as a matter of law* that the S. S. Harry Lane had been converted into a vessel in navigation, and that the findings of the trial court were clearly erroneous.

> *"Since we are unwilling to upset the trial court's factual determination that the S.S. Harry Lane was not a vessel in navigation, it follows that there was no warranty of the ship's seaworthiness. * * * "*
> (Italics Counsel's)

Counsel for petitioners rely on the cases of *United N. Y. & N. J. Sandy Hook Pilots Assn. v. Halecki*, 358 U.S. 613, 79 S. Ct. 517, 3 L. Ed. 2d 541 (1959); *Berryhill v. Pacific Far East Line*, 238 F. 2d 385 (9th Cir. 1956), cert. denied 354 U.S. 938, 77 S. Ct. 1400, 1 L. Ed. 2d 1537 (1957); and *Raidy v. United States*, 252 F. 2d 117 (4th Cir. 1958) cert. denied 356 U.S. 973, 78 S. Ct. 1136, 2 L. Ed. 2d 1147 (1958). It is respectfully submitted that the facts of these cases are clearly distinguishable from the case at bar.

In *Raidy*, as quoted on Page 7 of the petition for certiorari, the Court found that structural changes to the vessel were being made; the entire crew had been discharged long before the accident occurred; and the vessel had been "withdrawn from navigation for a long period."

In *Berryhill*, as quoted on Page 7 of the petition, the opinion shows that the vessel had been drydocked for a long period of time *on land*. In any event, it is respectfully submitted that the decision in Berryhill is unsound in view of the more recent opinions of this Court on the subject.

The decision in *Halecki* was predicated upon the highly specialized nature of the work being performed. There is nothing in the record of that case to show that the operation was "routine maintenance." In fact, the rationale of the *Halecki* decision is best stated by the quotation by this Court of Judge Lombard's dissenting opinion in the Court of Appeal, i.e., that the decedent "was not doing what any

crew member had ever done on this ship or anywhere else in the world as far as we are informed."

It is respectfully submitted that none of the cases relied on by petitioners are factually apposite to the case at bar.

CONCLUSION

It is respectfully submitted that upon this record there can be no clear and manifest error in the lower court's *findings of fact* that the MARINER had not been removed from navigation and that the warranty of seaworthiness extended to Allen. Under such circumstances, the petition for certiorari should be denied.

Respectfully submitted,

By C. Paul Barker

C. PAUL BARKER,
711 Carondelet Building,
New Orleans, Louisiana.

Admitted August 31, 1960

JOHN L. AVANT,
429 Government Street,
P. O. Box 967,
Baton Rouge, Louisiana.

By John L. Avant

Of Counsel:
DODD, HIRSCH, BARKER,
AVANT & WALL

CERTIFICATE

I HEREBY CERTIFY that a copy of the foregoing has been duly served on opposing counsel by depositing the same in the United States Mail, postage prepaid, addressed to them at their office.

Baton Rouge, Louisiana, this 23 day of December 1966.

s/ C. Paul Barker

C. PAUL BARKER

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JAN 5 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 763

UNION BARGE LINE CORPORATION,
DRAVO CORPORATION and
AETNA CASUALTY AND SURETY COMPANY,
Petitioners,

versus

WALTER M. ALLEN,
Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

GEORGE B. MATTHEWS of
LEMLE & KELLEHER,
1836 National Bank of
Commerce Building,
New Orleans, Louisiana,
Attorneys for Union Barge Line Corporation and Aetna Casualty and Surety Company.

W. FORD REESE,
GEORGE V. BAUS of
ADAMS AND REESE,
846 National Bank of
Commerce Building,
New Orleans, Louisiana,
Attorneys for Dravo Corporation and Aetna Casualty and Surety Company.

HAUSER-AMERICAN, "LEGAL PRINTERS", 411 GRAVIER STREET, NEW ORLEANS, LA.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 763

UNION BARGE LINE CORPORATION,
DRAVO CORPORATION and
AETNA CASUALTY AND SURETY COMPANY,
Petitioners,

versus

WALTER M. ALLEN,
Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

May It Please the Court:

It is submitted that respondent's brief in opposition to the petition for a writ of certiorari has attempted to categorize this case as being within the ambit of a factual decision rather than meeting the legal issues which were presented in the petition and which we submit are inherent in the record.

The entire thrust of the opposition is that respondent's injuries were sustained when the M/V MARINER was in navigation and that the repairs being performed were "routine maintenance" so as to require the application of

the *Sieracki* doctrine. Petitioners do not take the position that the MARINER was removed from navigation in the sense of *West vs. United States*, 361 U.S. 118, 80 S. Ct. 189, 4 L. Ed. 2d 161 (1959). However, the record clearly indicates that the repairs which were being performed were not "routine" in the sense of day-to-day or month-to-month repairs. They were "routine" in the sense of there being required on a more or less regular schedule. Whether or not the repairs were "routine," it can hardly be said that a vessel with gaping holes in her underwater structure resulting from her shafts having been pulled, is not withdrawn from navigation during the period that the shafts are withdrawn. It can hardly be said that a vessel is "in navigation" for purposes of a warranty of seaworthiness, simply because repairs are performed on a regularly scheduled basis — annually or biannually. No inference that the vessel is not withdrawn from navigation may be drawn from this fact, for in her then status, she is as unseaworthy and unfloatable as a ship with no bottom. To compare this type of work with the work of removing accumulated sludge or washing down the engine room (Opposition, Page 9) is rather far-fetched to say the least.

Likewise, to attempt to isolate the work which was being performed by the injured shore-based worker and break down the overall repair job on the shafts and propellers into its component parts cannot be justified. The work which respondent was performing at the time that he sustained his injury was so closely connected to the removal and reinstallation of the propeller shafts as to be an integral part thereof.

We pass without more than this comment the argument that the work was done in a floating dry dock and that the machine shop was a floating machine shop. (Opposition, Page 6) Whether the shops were floating or were

situated on land, and whether the vessel was in a graving dock, a dry dock, on a marine railway, or any other type of repair basin is of no moment: the ultimate fact is that the MARINER was removed from the water and was inoperable.

Despite respondent's attempt to suggest to this Court that the petition involves only factual issues, respondent recognizes in his opposition that there is a clear cut legal issue involved. On page 8 of the opposition, respondent says:

> "However, it is submitted that under the decisions of this Honorable Court, once the status of the vessel is determined as being that of a ship in navigation, a detailed inquiry into the precise task being performed by each of the shorebased workers is precluded. The decisions make it clear that once this status is determined, all engaged in the repair operation are entitled to the warranty if the status be that of a ship in navigation, and none are entitled to the warranty if the determination of status is otherwise.
>
> The warranty of seaworthiness arises from the vessel's status as such, and extends to all engaged in her service. *Seas Shipping Co. v. Sieracki*, 328 U.S. 878, 66 S. Ct. 872."

Other than *Sieracki*, which does not stand for the proposition that respondent claims, no authorities of this Court or of any lower Courts are cited. Petitioner concedes that the MARINER was not withdrawn from navigation in the *West* sense. The record, however, as above mentioned, is clear that the MARINER was out of the water and inoperable. Under these circumstances, it is our submission that a shore-based repairman using specialized heavy equipment and tools not available on a vessel is not entitled to a warranty of seaworthiness.

It is not correct to say, as respondent does, that once a vessel is determined to be "in navigation" all shore-based workers of whatever type and regardless of the type of work being performed are entitled to a warranty. Neither *Sieracki*, *West*, nor any other decision of this Court so holds, and on the contrary the statement flies in the face of *Halecki*, 358 U.S. 613, 79 S. Ct. 517, 3 L. Ed. 2d 541 (1959). As in *Halecki*, the respondent here "was not doing what any crewmember had ever done on this ship or anywhere else in the world", for it would be impossible for the members of the crew to pull the shafts of a vessel unless and until the vessel was out of the water and shore-based cranes are used.

A District Court in Massachusetts in an opinion published after the filing of the petition herein has so recognized. *Madden vs. United States*, 259 F. Supp. 663 (D.C. Mass., 1966) involved facts virtually identical to those in the instant case, but reached a directly contrary conclusion. We realize that a conflict between the Circuits rather than between District Courts is a requisite for invoking Rule 19 of the Rules of this Court insofar as applications for writs of certiorari are concerned, but we submit that the decision in the cited case demonstrates that there is an area of confusion existing which requires that this Court review this case if only to set forth guide lines for the Lower Courts to act on in the future.

In *Madden*, a United States Navy icebreaker was in the Bethlehem Steel Corporation shipyard in Boston for repairs. The vessel's twin propellers were being removed while she was in dry dock. Half of the crew had left on

furlough. In the process of reinstalling one of the propellers, a Bethlehem shipyard employee fell from a temporary staging and was injured. The District Court held that there was no warranty of seaworthiness, saying:

> "A 16,000 ton vessel which has had her twin 25-ton screws removed, which has shut down her engine and is receiving electrical and steam power from a source on shore, which has put half or more of her crew on furlough, and which is in drydock, is not a vessel in operating condition. Hence, her owner makes no warranty of seaworthiness while she is in that condition."

Cases involving injuries to shipyard employees sustained on board vessels are numerous. In no case that we have found, however, other than the instant case, has any Court gone so far as to hold that the owner of a vessel in dry dock, with her shafts removed and undergoing repairs which could not and never have been performed by crewmembers because in part of the need for shore-based gear, owes a warranty of seaworthiness to a shore-based worker injured in the performance of such work. Historically and conceptually, the work is not that of a seaman and no reason exists for the further extension of the doctrine of *Sieracki;* and certainly if the doctrine is to be extended, the ultimate word should be handed down by this Court and not by inferior Courts, which as shown herein will surely lack the uniformity so desired by the Admiralty and our social conditions. A worker on the east bank of the Hudson River should have no different rights under United States law than one on the east bank of the Mississippi River. Unless Your Honors grant our application and set the issue at rest, the lower Courts in applying the doctrine

will only create more confusion than already exists in this dynamic and already confused area.

Respectfully submitted,

GEORGE B. MATTHEWS of
LEMLE & KELLEHER,
1836 National Bank of
Commerce Building,
New Orleans, Louisiana,
Attorneys for Union Barge Line Corporation and Aetna Casualty and Surety Company.

W. FORD REESE,
GEORGE V. BAUS of
ADAMS AND REESE,
846 National Bank of
Commerce Building,
New Orleans, Louisiana,
Attorneys for Dravo Corporation and Aetna Casualty and Surety Company.

CERTIFICATE

I hereby certify that a copy of the above and foregoing supplemental brief on behalf of petitioner has been duly served on C. Paul Barker, Esq. and John L. Avant, Esq. by depositing same in the United States mail, postage prepaid, addressed to them at their office at 429 Government Street, Baton Rouge, Louisiana 70821.

New Orleans, Louisiana, this ..... day of January, 1967.